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IN THE

Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY, ET AL.,
Petitioners,

v.

JANE DOE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-NINE MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici curiae ("Media *Amici*"), described more fully in Appendix A, are The Reporters Committee for Freedom of the Press and twenty-nine of the nation's leading news organizations – ABC, Inc., The Associated Press, The Association of Alternative Newsweeklies, The Association of American Publishers, Inc., Bloomberg News, CBS Broadcasting Inc., Cox Newspapers, Inc., Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., The Hearst Corporation, Magazine Publishers of America, Inc., The McClatchy Company, National Newspaper Association, National Public Radio, Inc., NBC Universal, Inc., The New York Times Company, Newspaper Association of America, The Newspaper Guild - CWA, Newsweek, Inc., The Radio-Television News Directors Association, Reuters America LLC, The Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, Inc., U.S. News & World Report, L.P., and The Washington Post.

Media *Amici* often rely on access to court proceedings and documents to report on matters of public concern. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

(1980), Media *Amici* and other journalists need unfettered access to all information that sheds light on the function of the courts, whether in civil or criminal cases. This case concerns issues critical to the media specifically and the public in general: when a court may cut off public access to proceedings and documents, and whether it may deny an interested person the ability to challenge such a sealing order.

SUMMARY OF ARGUMENT

Media *Amici* urge the Court to accept review of this case in order to make clear that the constitutional right of access to the courts extends to civil records and proceedings.

Despite the profound issues at stake – abortion, medical privacy, and alleged employment discrimination – this case was conducted entirely in secret for *seven years*. Searching for the case on the district court or circuit court docket yields no result. The hearings, briefs, court records, and even trial court orders were all hidden from public view, and it was not until the Third Circuit issued a precedential opinion in May that the public became aware of the existence of this case. Even now, every record is sealed save the Third Circuit's orders and the Supreme Court docket.[2] Absent correction from this Court or a change of heart below, the case will presumably go to trial in secret.

This Court should clarify that such an arrangement is unconstitutional. Nearly 30 years ago, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the Court recognized a presumptive right of access to criminal proceedings. The Court has reiterated its holding repeatedly, and the circuits since have applied the same reasoning to recognize a corresponding right of access to civil proceedings and to court records. But the decision below – a reported,

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[2] Like Petitioners, Media *Amici* do not challenge Plaintiff Jane Doe's ability to proceed using a pseudonym, an issue not before the Court.

precedential decision affirming a blanket sealing order without any explanation or findings of fact – has highlighted the uncertainty created when the *Richmond Newspapers* Court reserved the issue of access to civil proceedings. Because the historical and policy considerations underlying the right of access in criminal cases are largely similar to those in civil cases, the Court should accept review of this case to clarify that the public has a qualified constitutional right of access to civil proceedings and records.

The Court should also accept review to correct the Third Circuit's error in refusing, with little explanation, even to allow Petitioners to intervene for the limited purpose of challenging a sealing order. Such a ruling effectively denied the public and press the ability to challenge sealing orders and thereby eviscerated any right of access to court proceedings and documents. In light of prior rulings of this Court that require courts to provide the public with notice and an opportunity to be heard before limiting access to proceedings, lower courts generally agree that intervention is the best (and sometimes only) way for a member of the public to challenge a closure order. But whatever the method of challenging secrecy, the press and the public must have some means of objecting to the closure of court proceedings and records. Particularly in a case of significant public importance, it is imperative, at minimum, that this Court protect the right of the public to be heard on the issue of its exclusion.

Review is also appropriate because the Third Circuit has sanctioned a drastic departure from the "accepted and usual course of judicial proceedings," S. Ct. R. 10(a), which warrants reversal as an exercise

of this Court's supervisory powers. The complete secrecy in this case – as well as the lower courts' failure to issue sealing orders, to make any individualized findings, to explore less restrictive alternatives, or to give the public an opportunity to be heard – constitutes an egregious violation of well-settled law.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW HIGHLIGHTS UNCERTAINTY ON THE FUNDAMENTAL ISSUE OF SECRECY IN COURT PROCEEDINGS.

A. The First Amendment and this Court's jurisprudence support recognition of a qualified public right of access to civil proceedings.

This Court consistently has recognized that the public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases. *See Richmond Newspapers*, 448 U.S. at 573 (plurality opinion) ("we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (statute mandating closure of courtroom during testimony of minor victims of sex crimes violated the First Amendment); *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984) (recognizing public right of access to *voir dire* proceedings); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (unanimously recognizing right of access to hearing on motion to suppress evi-

dence); *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13 (1986) (recognizing right of access to pretrial hearings); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (right of access to preliminary hearing).

This presumption of access is based on the "unbroken, uncontradicted history" of public criminal proceedings in Anglo-American law and the positive contribution of openness toward the historical function of the proceedings. *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion); *see also Press-Enterprise I*, 464 U.S. at 505-07 (discussing history of openness in criminal trials). Among other benefits, the public's ability to observe criminal proceedings enhances the legitimacy of verdicts, fosters both fairness and the appearance of fairness, and guards against abuse. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe*, 457 U.S. at 606. Accordingly, for almost three decades it has been clear that a judge may close proceedings in a criminal case only after making specific, on-the-record findings that "closure is essential to preserve higher values [than the public's right of access] and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.

This Court has not directly addressed whether the public also has a constitutional right of access to civil cases, but a plurality found that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality opinion).

Many federal courts subsequently have recognized a public right of access to proceedings and documents in civil cases, though they have differed on the origin and scope of the right. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) ("the First Amendment does secure a right of access to civil proceedings"); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) ("we agree with the Third Circuit in *Publicker Industries* ... that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*"); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984) (recognizing a constitutional right of access to contempt proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (First Amendment and common law limit judicial discretion to seal documents in civil litigation); *Newman v. Graddick*, 696 F.2d 796, 801-03 (11th Cir. 1983) (constitutional right of access to proceedings and common-law right of access to documents in civil case involving prison conditions).

Indeed, a unanimous California Supreme Court found both a logical basis and universal support for a constitutional right of access to civil proceedings, saying that "[a]lthough the high court's opinions in *Richmond Newspapers, Globe, Press-Enterprise I*, and *Press-Enterprise II* all arose in the criminal context, the reasoning of these decisions suggests that the First Amendment right of access extends beyond the context of criminal proceedings and encompasses civil proceedings as well." *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999). It added that "[i]ndeed, every lower court opinion of

which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials." *Id.* (internal citations omitted). The District of Columbia Court of Appeals agreed, finding that "[n]o court has expressly concluded that the first amendment does not guarantee some right of access to civil trials." *Mokhiber v. Davis*, 537 A.2d 1100, 1107 n.4 (D.C. 1988).

The circuits have recognized that public access to civil court records is equally important. For example, the Second Circuit made clear that "the press and public possess a qualified First Amendment right of access to docket sheets" in part because "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 93 (2d Cir. 2004); *see also Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (finding "a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith"); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179 (strong presumption of access to civil court records and proceedings); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (constitutional right of access to "documents filed in connection with a summary judgment motion in a civil case"); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984) (constitutional presumption of access to evidence supporting dispositive motion in civil case); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*,

24 F.3d 893, 897 (7th Cir. 1994) (assuming both a First Amendment and a common law right of access to civil litigation documents).

B. The public policy interest in access to civil proceedings and records mirrors the long-recognized interest in open criminal proceedings.

The press and public have a legitimate interest in knowing the details of this case, which is a case of first impression in the Third Circuit and deals with fundamental issues of privacy, abortion rights, and employment discrimination. That the proceeding is civil, rather than criminal, is immaterial. "[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386-87 n.15 (1979).

The circuits likewise have recognized that the public policy interest in open civil proceedings mirrors the interest in open criminal proceedings. For example, the Sixth Circuit recognized a First Amendment right of access to civil trials because "[c]ivil cases frequently involve issues crucial to the public – for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc." *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179. The court added that "[t]he concern ... that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting," because "[i]n either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* The Seventh Circuit

added that "mistakes in civil proceedings may be more likely to inflict costs upon third parties, therefore meriting even more scrutiny." *Grove Fresh Distributors*, 24 F.3d at 897.

The Third Circuit itself agreed, finding that "[p]ublic access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs." *Publicker Indus., Inc.*, 733 F.2d at 1070. But the decision below is an implicit repudiation of this view, and the Court should grant review to make clear that the public and press have the same qualified right of access to civil proceedings that they enjoy with respect to criminal proceedings.

C. The total secrecy below, ratified in a precedential opinion from the Third Circuit, highlights the need for guidance from this Court.

The court below neither embraced nor rejected this broad consensus in favor of a constitutional right of access to civil cases. Indeed, the opinion addressed the issue only in passing, saying "[t]here was no abuse of discretion. The record fully supports the District Court's order." *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 371 (3d Cir. 2008).

Nevertheless, the Third Circuit's published, *precedential* opinion sealing the case in its entirety – with no explanation, no findings of fact, and no opportunity to object – is likely to be interpreted by future litigants as a rejection of the constitutional presumption in favor of access. If so, the decision would create a split with the Second, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, *see supra*, Sec-

tion I.A., as well as the many other courts that have recognized a First Amendment right of access to civil proceedings and records. And even if it is not intended to be an explicit rejection of the presumption of openness, the opinion below creates a massive exception by authorizing secret proceedings with no public notice or justification. As Petitioners noted, such a broad exception would itself create a circuit split. *See* Petition for a Writ of Certiorari at 10-13. Such a sweeping and perfunctory rejection of the interest in access should be reversed.

Of course, recognizing a constitutional right of access would not mean that judges can never conduct closed civil proceedings or seal civil records. Instead, it means simply that they would have to do so only after making specific, on-the-record findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. This would represent a reasonable interpretation of this Court's holdings in *Richmond Newspapers* and subsequent cases, and it is the same standard that governs criminal cases nationwide.

In addition to correcting the errors below, clarifying that the *Press-Enterprise* standard extends to civil cases would curb the pervasive secrecy that has infected state and federal trial courts. In recent years, trial courts have maintained entire secret dockets containing (at minimum) tens of thousands of cases, often mundane legal matters involving the rich and politically powerful. For example, following the Second Circuit's decision in *Pellegrino*, 380 F.3d 83, the State of Connecticut alone unsealed more than 10,000 case files on its secret docket, most of

which "comprised divorce or family law matters involving state officials, judges, prominent attorneys, corporate officers, and celebrities, including Bruce Springsteen's saxophonist and a soap opera star." Meliah Thomas, *Comment: The First Amendment Right of Access to Docket Sheets*, 94 Cal. L. Rev. 1537, 1552 (2006) (internal citations omitted).

Even within the federal system, it is impossible to know even the approximate number of cases that are sealed in their entirety. A 2003 survey found that "[a]s of June 2003, the Middle District of Georgia had 33 secret civil cases pending, the Northern District of Florida had seven secret civil cases pending, the Western District of Arkansas and the Eastern District of Wisconsin each had two secret civil cases pending, and the Districts of North Dakota and South Dakota did not have any secret civil cases pending." However, "[m]any federal courts would not say how many cases they had, and the Administrative Office of the U.S. Courts does not monitor the number of secret cases filed in federal courts across the country."[3]

Heightening this uncertainty is the fact that the Federal Rules of Civil Procedure are silent on the procedural prerequisites to sealing civil court documents. This leaves districts to decide for themselves whether to enact local rules honoring a presumption of access to civil documents and proceedings and

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[3] *See* Reporters Committee for Freedom of the Press, *Secret Justice: Secret Dockets*, *available at* http://www.rcfp.org/secretjustice/secretdockets.

leads to very different standards even among neighboring districts. For example, the Eastern District of Oklahoma notes that "sealed documents, confidentiality agreements, and protective orders are disfavored," adds that a "motion seeking [a sealing order] must contain sufficient facts to overcome the presumption in favor of disclosure," and instructs that "[t]he relief sought shall be narrowly tailored to serve the specific interest sought to be protected." E.D. Okla. Local Rule 79.1. Meanwhile, the local rules for the Western District of Oklahoma, like many other districts, are silent on the issue. By granting review and clarifying the constitutional standard, the Court would provide uniformity that has been absent with regard to civil litigation.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHEN AND HOW THE PUBLIC MAY INTERVENE TO CHALLENGE A CLOSED PROCEEDING.

A. Intervention for the limited purpose of challenging sealing orders should be permitted to preserve the presumptive right of access to court proceedings and documents.

If the public has a right of access to court proceedings and documents, no matter its source and content, there must be some procedural means for preserving that right. By refusing to allow Petitioners to intervene for the purpose of challenging secrecy, the Third Circuit impermissibly cut off the only feasible method of objecting to the closure.

While there is not complete uniformity on the issue, "[t]he courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through intervention for that purpose." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988)); *see also In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" for challenging closure orders); *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (citing "wide approval" of intervention to challenge protective orders). Indeed, some courts have ruled that the press must move to intervene in order to challenge closure, rather than petition for mandamus. *See Hertz v. Times-World Corp.*, 528 S.E.2d 458, 463 (Va. 2000) (mandamus was erroneously granted because intervention provided adequate remedy at law).

Intervention is the preferred method of challenging closure orders for several reasons. It leaves the closure decision in the hands of the courts that are most familiar with the case and that will be directly affected by the decision. *See, e.g., News American Division v. State*, 447 A.2d 1264, 1271-72 (Md. App. 1982). It is also the most efficient and least disruptive means for challenging a closure order, because other courts are not prematurely brought in to regulate the dispute. *Id.* at 1272. In other words, intervention allows the court to make a ruling based on the facts and evidence presented to it, and with the benefit of arguments presented by all interested persons, before another court steps in to review whether that closure or sealing order was valid.

Moreover, intervention is the best solution because it allows the public and press an opportunity to be heard before proceedings are closed. "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe*, 457 U.S. at 609 n.25 (1982) (citing *Gannett*, 443 U.S. at 401 (Powell, J., concurring)). Intervention is optimal because "the values that animate the presumption in favor of access require as a 'necessary corollary' that, once access is found to be appropriate, access ought to be 'immediate and contemporaneous.'" *In re Associated Press*, 162 F.3d at 506 (internal citations omitted).

Intervention also benefits the court because it allows all interested persons to discuss the potential harm in disclosure and whether less restrictive alternatives are available. This allows the trial court to issue specific findings of fact that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. This procedural component is vital, among other reasons, because it is an essential prerequisite to meaningful appellate review of the sealing. *Id.* ("[t]he interest [in closure] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered").

B. In addition to correcting the erroneous sealing in this case, there is an important policy interest in this Court establishing clear guidelines for seeking access to court records.

The Court should accept review in order to recognize explicitly the right to intervene for the limited purpose of challenging a sealing order. This case highlights the need for a clear-cut intervention right, because the Third Circuit cut off the only feasible path that Petitioners could use to challenge the sealing of the appellate record.

Intervention is permissible at the appellate level as well as before the trial court. *See International Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention [in district court] may be applicable in appellate courts .... [W]e think the charged party would be entitled to intervene"); *Building & Constr. Trades Dep't. AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("standards for intervention applicable in the district court" also apply in appellate courts). Indeed, intervention may provide the only method short of Supreme Court review for asserting the right of access to appellate proceedings and records, since mandamus would be available only from the Supreme Court and initiating a collateral proceeding would be either impossible or utterly impractical.

Nevertheless, the Third Circuit did not evaluate the Petitioners' request to unseal the records in this case. Rather, it refused, with little explanation, even to allow the Petitioners to intervene for the purpose of challenging the closure. *See Doe v. C.A.R.S. Protection Plus, Inc.*, --- F.3d ----, 2008 WL 4190266 (3d Cir. Sep. 09, 2008). Nor did it suggest another way to challenge the closing, aside from suggesting in a subsequent order that Petitioners go back to the district court. *Id.* But this is a partial remedy at best, because the district court cannot unseal the appellate

record. This Court should clarify that, whatever the merits of the underlying request to unseal, the Third Circuit should have allowed Petitioners to intervene for the purposes of challenging the closures.

III. TOTAL SECRECY BELOW, WITHOUT EXPLANATION OR OPPORTUNITY TO OBJECT, IS A DRASTIC DEPARTURE FROM THE "ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" AND WARRANTS EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

One of the Court's considerations for granting review is whether a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). This criterion is undoubtedly met here, as the Third Circuit has sanctioned a drastic departure from the usual course of a civil proceeding.

As discussed *supra*, Section I, it is neither typical nor constitutionally acceptable for a court to conduct a case entirely in secret, without entering a sealing order, articulating any findings to support secrecy, or considering the possibility of less restrictive alternatives such as closing portions of hearings and redacting records.[4] First, it is well established that courts

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[4] The fact that the Defendants also opposed the secrecy in this case underscores the need for some oversight of the lower courts' activity. *See C.A.R.S. Protection Plus*, 527 F.3d 358 at 371.

must make findings to support closing proceedings or keeping documents under seal. *See Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992) (vacating sealing order because proper sealing requires "a showing of extraordinary circumstances set forth by the district court in the record"); *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (holding that it was improper for district court to seal "[a]lmost every document" filed in the case without making any findings in support); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (vacating order to seal plea agreement where the court "failed to articulate any findings in support of the ... Order); *Application of National Broadcasting Co., Inc.*, 828 F.2d 340, 346 (6th Cir. 1987) (vacating order sealing pleadings and exhibits, and remanding for more adequate findings and consideration of less restrictive alternatives). Yet neither the district court nor the Third Circuit made any public findings to support a sealing order. Indeed, neither issued a public sealing order, and the two perfunctory sentences at the end of the Third Circuit's opinion provide the only public discussion of the sealing issue.

Second, the district court and Third Circuit appear to have given no consideration to the possibility of fashioning a less restrictive alternative to blanket secrecy, such as redacting documents and selectively closing hearings. "[P]rior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests." *Press-Enterprise I*, 464 U.S. at 510." Thus, for example, "the constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of

jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses." *Id.; see also Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where public release of court records presents a risk to national security, "[p]ublic release of redacted material is an appropriate response").

By contrast, the courts below sealed the case in its entirety. Even the opinions of the district court are entirely sealed. *See Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348-49 (7th Cir. 2006) (hoping "never to encounter another sealed opinion" because "[t]he political branches of government claim legitimacy by election, judges by reason"). It simply cannot be the case that every pleading, transcript, docket, and district court order in this case contains information so sensitive that it cannot be revealed. *See id.* ("[t]he Supreme Court issues public opinions in all cases, even those said to involve state secrets").

Third, neither court provided the public with notice and an opportunity to comment on proposed closure orders, in violation of accepted procedural standards. *See Globe*, 457 U.S. at 609 n.25 (access rights meaningful only if press and public may be heard prior to exclusion); *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (court must provide notice on public docket of hearing to close proceedings).

Finally, the lower courts' handling of the case violates the established law of the Third Circuit itself, which has made clear that "to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest

and that there is no less restrictive way to serve that governmental interest." *Publicker Indus., Inc.*, 733 F.2d at 1070; *see also Cendent Corp. v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001) (invalidating confidentiality order where "the District Court failed to articulate the necessary findings to override the presumption of access when issuing the confidentiality order"); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3d Cir. 1995) ("[a]bsent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue").[5] But because the Petitioners were not even allowed to intervene to challenge the sealing, and therefore did not become "parties," it is unclear whether the Third Circuit was even able to entertain Petitioners' request for a rehearing *en banc*. *See* Fed. R. App. P. 35(b) (providing that a *party* may petition for rehearing *en banc*).

CONCLUSION

This case has been conducted for seven years in complete secrecy, a testament to the need for the Court's guidance regarding the right of access to civil hearings and records. The Court should grant review to clarify that the public has a constitutional right of access to civil proceedings and records, because civil proceedings implicate precisely the same concerns about the fairness of the justice system that underlie

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[5] *See also U.S. v. A.D.*, 28 F.3d 1353, 1356 (3d Cir. 1994) ("The First Amendment provides a right of public access in both civil and criminal cases"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) ("the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings").

the right of access to criminal proceedings. The Court should also clarify that the press and the public have a right to intervene for the limited purpose of challenging secret records and proceedings.

Moreover, review is warranted in order to correct the lower courts' abusive secrecy practices in a case of significant public interest. If the courts below had a compelling reason to close these proceedings, and were truly unable to devise less restrictive alternatives to total closure, they should be required to say so, and make public findings in support of this conclusion. And they should be required at least to entertain objections to such secrecy, rather than simply refuse a motion to intervene for the purpose of challenging the sealing. The failure below to meet these rudimentary obligations constitutes a drastic departure from usual and accepted judicial practice, and warrants intervention by this Court.

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(Additional attorneys listed in Appendix B.)

APPENDIX A

Identification of *Amici Curiae*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ABC, Inc., alone or through its subsidiaries, owns and operates, *inter alia*, ABC News, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public, including WABC-TV, New York; KABC-TV, Los Angeles; WLS-TV, Chicago; WPVI-TV, Philadelphia; KTRK-TV, Houston; KGO-TV, San Francisco; WTVD-TV, Raleigh-Durham, N.C.; WJRT-TV, Flint, Michigan; WTVG-TV, Toledo, Ohio, and KFSN-TV, Fresno, Cal. ABC News produces news and public affairs programs – including "World News with Charles Gibson," "Nightline," "Good Morning America," and "20/20" – that are distributed over the ABC Television Network for broadcast nationwide by ABC owned and affiliated stations.

The Associated Press ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

The Association of Alternative Newsweeklies ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including

weekly papers like The Village Voice, Boston Phoenix and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 20 million readers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world. Bloomberg News supplies real time business, financial and legal news to more than 200,000 desktop subscribers world-wide. As a wire service, Bloomberg provides news to more than 400 newspapers in 63 countries with a combined circulation of 76.2 million readers. Bloomberg also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public interest. Bloomberg also publishes four monthly magazines. Its Bloomberg Press division publishes more

than 50 book titles each year, and its internet website www.bloomberg.com receives 3.5 million individual user visits each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. CBS Broadcasting owns and operates broadcast television stations nationwide, and, through its CBS News Division, produces morning, evening and weekend news programming, as well as magazine programs such as "60 Minutes" and "48 Hours."

Cox Newspapers, Inc. ("CNI") is a privately held Delaware corporation. CNI and its subsidiaries publish 16 daily and 26 non-daily newspapers. CNI is a wholly owned subsidiary of Cox Enterprises, Inc. ("CEI"), also a privately held Delaware corporation and publisher of the Atlanta Journal Constitution. The combined circulation of CEI and CNI newspapers is approximately two million. Both corporations' principal place of business is Atlanta, GA.

Daily News, L.P., publishes the New York *Daily News*, which is the fifth-largest circulation newspaper in the country, serving primarily the New York City metropolitan area.

Dow Jones & Company, Inc. publishes, *inter alia*, the Wall Street Journal, Barron's magazine and other periodicals. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E. W. Scripps Company (www.scripps.com) is a diverse, 130-year-old media enterprise with inter-

ests in television stations, newspapers, and licensing/syndication. The company's portfolio of locally focused media properties is comprised of: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 15 markets and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service; and United Media, the licensor and syndicator of Peanuts, Dilbert and approximately 150 other features and comics. Scripps businesses operate robust, interactive Web sites in all their local markets.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 85 daily newspapers in the United States, including USA TODAY, and nearly 900 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations and its U.S. websites attract nearly 26 million unique visitors a month.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly traded company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a not for profit trade association comprised of more than 240 domestic magazine publishers who collectively publish over 1,400 magazines. MPA members provide broad coverage of domestic and international news

and other matters of interest to the public. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the *Sacramento Bee*, the *Miami Herald*, the *Kansas City Star* and the *Charlotte Observer*. The newspapers have a combined average circulation of approximately 2,600,000 daily and 3,200,000 Sunday.

Established in 1885, the National Newspaper Association ("NNA") is the national voice of community newspapers. NNA represents owners, publishers, and editors of America's community newspapers and with over 2,500 newspaper members, is currently the largest newspaper association in the United States. The mission of the National Newspaper Association is to protect, promote and enhance America's community newspapers. NNA is headquartered in Columbia, Missouri.

National Public Radio, Inc. ("NPR") is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

NBC Universal, Inc. is one of the world's leading media and entertainment companies in the develop-

ment, production, and marketing of news, entertainment and information to a global audience. Among other businesses, NBC Universal owns and operates the NBC Television Network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of 26 owned-and-operated stations. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline," and "Meet the Press."

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of Amer-

ica. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

Newsweek, Inc. publishes the weekly news magazines *Newsweek* and *Newsweek International*, distributed nationally and internationally, respectively, Newsweek.com, and Arthur Frommer's Budget Travel magazine, distributed nationally, and BudgetTravel.com.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters America LLC ("Reuters") is an indirect wholly-owned subsidiary of Thomson Reuters PLC, which serves the global financial markets and news media with a wide range of information products and transactional solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Reuters is the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 196 bureaus around the world, serving 129 countries. Reuters has a significant interest in this matter as it relies on the rights protected by the

First Amendment in order to produce a comprehensive news file, seen by over 1 billion people every day.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with newspapers from North Carolina to Hawaii. Its flagship paper, the Las Vegas *Review-Journal*, is the largest newspaper in Nevada.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 130 magazines in the United States and abroad. Its major titles include Time, Fortune, Sports Illustrated, People, and Entertainment Weekly. Time Inc. is a subsidiary of Time Warner Inc.

Tribune Company, Inc. operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households. In publishing, Tribune operates nine daily newspapers, including the Chicago Tribune, the Los Angeles Times, Newsday, The (Baltimore) Sun, and the South Florida Sun-Sentinel. In broadcasting, Tribune owns 23 television stations and Superstation WGN on national cable. These publishing and broadcasting interests are complemented by high-traffic news and information web sites.

U.S. News & World Report, L.P. is a limited partnership, the general partner of which is U.S. News & World Report, Inc. The company publishes content in various media, including *U.S. News & World Report*, a national news magazine, and the website www.usnews.com.

The Washington Post is a leading newspaper with nationwide daily circulation of over 699,000 and a Sunday circulation of over 929,000.

APPENDIX B

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